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The Detroit News, Inc. *and* Guild of Detroit, Local 22, The Newspaper Guild, AFL–CIO. Case 7–CA–41701

May 14, 2004

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND WALSH

On December 30, 1999, Administrative Law Judge William G. Kocol issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondent filed an answering brief. The General Counsel and the Charging Party also filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions[3] and to adopt the recommended Order.

[1] At the hearing following the testimony of alleged discriminatee Mleczko, the judge ordered the General Counsel to provide the Respondent with portions of the affidavits of Michael Zielinski and Frances DeChane, individuals who were not present at the hearing, not under subpoena by any party, and not called as witnesses by any party. The judge concluded that the Respondent had made a sufficient initial showing that these individuals may have been working in concert with Mleczko to organize and lead the November 13, 1998 rally at the University of Michigan's Ann Arbor campus, and that that initial showing justified the production of the affidavits. We find merit in the exceptions of the General Counsel and the Charging Party to this ruling. It is established Board practice to direct the production only of those affidavits given by witnesses who have testified at Board hearings, for purposes of possible impeachment on cross-examination, as required by *Jencks v. United States*, 353 U.S. 657 (1957), and by Sec. 102.118 of the Board's Rules and Regulations, Series 8, as amended. See *Holly Farms Poultry Industries, Inc.*, 181 NLRB 890, 891 fn. 1 (1970), enfd. 460 F.2d 312 (4th Cir. 1972). We find, however, that the judge's ruling was not prejudicial in view of his finding that Mleczko did not play a leading role in the demonstration. Because Member Schaumber agrees with his colleagues that the judge's rule ordering the General Counsel to provide the affidavits was not prejudicial, he finds it unnecessary to pass on whether the judge's treatment of the affidavits at issue was improper under the circumstances presented.

We find it unnecessary to pass on whether the judge properly admitted the report of the incident submitted by a University safety officer. As discussed by the judge, the information contained in the report was cumulative since witnesses had credibly testified to the relevant facts. Member Schaumber finds that the judge's admission of the incident report as corroborating the testimonial evidence was not improper.

[2] The General Counsel and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] Member Schaumber agrees with his colleague's adoption of the judge's conclusion that Mleczko's conduct lost the protection of the Act. See *Bethany Medical Center*, 328 NLRB 1094 (1999), citing *NLRB v. Washington Aluminum Co*., 370 U.S. 9, 17 (1962), for the proposition that "Section 7 has been interpreted not to protect concerted activity that is unlawful, violent, in breach of contract, or otherwise indefensible." *Cf. Town & Country Supermarkets*, 340 NLRB No. 172, slip op. at 3–4 (2004)(threats within the context of Sec. 7 activity are not protected and thus not immune from employer discipline). The judge relied on *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964), in finding the discharge of employee Mleczko lawful. Member Schaumber notes that *Burnup & Sims*, unlike this case, involved an employer that discharged an employee based on a good faith but mistaken belief that the employee engaged in misconduct during the course of protected activity. But see, e.g., *E.W. Grobbel Sons*, 322 NLRB 304 (1996), revd. on other grounds 149 F.3d 1183 (6th Cir. 1998), cited by the judge.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. May 14, 2004

Wilma B. Liebman, Member

Peter C. Schaumber, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Linda Rabin Hammell, Esq., for the General Counsel.

Robert M. Vercruysse and *Bernice McReynolds, Esqs. (Vercrusse, Metz, & Murray),* of Detroit, Michigan, for Respondent.

John Adam, Esq. (Martens, Ice, & Geary), of Detroit, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Detroit, Michigan, on October 13, 1999. The charge and amended charge were filed January 21 and February 26, 1999, respectively, by the Newspaper Guild of Detroit, Local 22, The Newspaper Guild, AFL–CIO (the Union). The complaint was issued March 9, 1999. The complaint alleges that The Detroit News, Inc. (Respondent) violated Section 8(a)(3) and (1) when it discharged Louis Mleczko on December 4, 1998.[1] Respondent filed a timely answer that denied this allegation. On May 11, 1999, Respondent filed a motion to dismiss; the Board denied this motion on the basis that it raised

[1] All dates are in 1998 unless otherwise indicated.

genuine issues of material fact that would be better resolved after a hearing before a judge.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel,[2] Respondent,[3] and the Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation and a subsidiary of Gannett Newspapers, Inc., at its facility in Detroit, Michigan, is engaged in the operation of the news and editorial departments of the Detroit News, a daily newspaper. Respondent, in the course of its business operations, annually derives gross revenues in excess of $200,000 and has held membership in and/or subscribed to various interstate news services, published various nationally syndicated features, and advertised various nationally sold products. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

This case is part of lengthy and ongoing litigation stemming from the bargaining between the parties and a strike that began on July 13, 1995. The Board has concluded that Respondent violated Section 8(a)(5) by failing to bargain in good faith with the Union and that the strike was consequently an unfair labor practice strike.[4] The Board has also concluded that Respondent has violated Section 8(a)(3) by failing to reinstate the strikers after they made an unconditional offer to return to work.[5] The labor disputes continues; the Union describes the situation as a lockout because Respondent has rejected the unconditional offer to return to work.

As a result of a formal settlement stipulation, the Board also has entered an order against the Union and other unions engaged in the strike. The order, which has been enforced by the Sixth Circuit Court of Appeals, provides that the Union will not engage in certain conduct in violation of Section 8(b)(1)(A).

Louis Mleczko first began to work for the newspaper in 1971; he worked as a reporter. Mleczko has also been president of the Union since 1976. Mleczko has played an active visible role in promoting the Union's position during and after the strike. He has served as lead negotiator of the bargaining committee and has spoken on the Union's behalf to community groups, the media, and other labor organizations. At all times material Mleczko has been on leave from his position with Respondent.

B. The November 13 Incident

Susan Burzynski is an assistant managing editor for administration for Respondent. Her duties include recruiting employees to work in the newsroom. On November 13, she was at the University of Michigan campus in Ann Arbor to interview students to work as summer interns for a 12-week period at the newspaper. Burzynski had previously arranged with the University to have interested journalism students sign up for interviews. The interviews were held on campus in the Frieze Building. The room where the interviews were conducted was used as the Communications Department library. It had reference books and magazines along the walls and several small tables and chairs. Burzynski began the interviewing process. The students appeared individually for the interview and Burzynski told them about the newspaper and about the positions that were available. She also reviewed their qualifications and answered questions.[6]

Meanwhile Mleczko was also present at the University that day. He came to attend a rally sponsored by the Graduates Assistants Union to show its support for the unions involved in the continuing labor dispute with Respondent. This group had earlier held rallies and otherwise supported the Union in its labor struggle with Respondent; however, the Union played no part in preparing the rally to be held on November 13. Mleczko met the group on campus in a plaza referred to as the "diag" at about 1 p.m. A leader of the Graduates Assistants Union was using a loudspeaker to address a group of about 45 to 50 students, strikers, and others.

At some point the speaker announced that he had learned that Respondent was conducting interviews and that the group should walk to the building where they believed the interviews were being held to protest there. This was the first that Mleczko learned that Respondent was conducting business on campus. The group then walked several blocks to the building. Once there the group reassembled and began chanting slogans such as "No scab papers" and "No News or Free Press wanted here." Other speakers made remarks to the group. One speaker said that they were there to protest the recruiting of students by the newspaper and that they were going to relay the complaint to the editors inside the building. He announced that a delegation would go into the building to do so. He invited Mlecko to be part of the delegation and Mleczko agreed. At that point about six protestors entered the building where the leader of the group introduced the delegation to a woman working in the building. This woman advised the delegation that no interviews were being conducted in that building. The group, including Mleczko, voiced their objections to the recruiting efforts that Respondent was conducting on campus. The delegation then rejoined the main group outside that building. Once outside the building the leader introduced Mleczko who then addressed the demonstrators. Using the loudspeaker, Mleczko gave a brief history of the labor dispute with Respondent from the Union's perspective. His remarks to the group lasted about 10 minutes. The leader of the rally then announced that he had

[2] The General Counsel's unopposed motion to correct the transcript is granted.

[3] Respondent's motion for special permission to file a reply brief is denied.

[4] *Detroit Newspapers*, 326 NLRB 700 (1998).

[5] *Detroit Newspapers*, 326 NLRB 782 (1998).

[6] These facts are based on Burzynski's credible and uncontested testimony.

learned that the interviews were being conducted at the Frieze building located on campus several blocks away.

The demonstrators then moved to the Frieze building. Along the way they continued shouting the chants; the leader of the rally led the chanting using his loudspeaker. Although some demonstrators left the group others joined, so the size of the group remained about the same. The group, including Mleczko, then entered the Frieze building, walked up a staircase to the next floor, and walked down to the end of the corridor to the department of communications. The protestors continued shouting chants led by the leader using the loudspeaker. Mleczko distributed a pamphlet to students and faculty in the area. The pamphlet described the Union's labor struggle with Respondent. Mleczko distributed this pamphlet for about 15 to 20 minutes when someone opened the door to the library and the group, including Mleczko, poured into and filled the room.[7]

Meanwhile, inside the room, Burzynski had been interviewing an applicant when an employee of the University advised her that demonstrators were on their way and she might want to shut the door to the room. Burzynski did so. Soon thereafter Burzynski heard noise outside the door. The demonstrators shouted that students should not work for the "scab" newspapers. They used a loud speaker, sirens, and other noisemakers. The student who was being interviewed happened to be running for editor of the student newspaper. The demonstrators shouted that the students should not vote for her if she wanted to work for the newspaper. The demonstrators opened the door to the room but Burzynski got up and closed it. The door was opened two or three more times; each time Burzynski closed it. The volume of noise outside the door was such that Burzynski and the student applicant were barely able to hear each other talk. Burzynski concluded that it was impossible to continue the interview. At that point the next student to be interviewed entered the room and reported to Burzynski that he was too frightened to remain outside and so decided to come in. Burzynski decided to call the police for assistance. She dialed information for the telephone number but the operator was unable to hear her due to the noise outside the door. The door opened again and this time a protestor put her foot in the doorway preventing Burzynski from closing the door. Burzynski asked the demonstrator to remove her foot so she could close the door, but the demonstrator replied to the effect "make me." Burzynski then told the two students that they needed to leave and that it might be safer if they all left together. As they started walking towards the door the protestors began to flow into the room. They continued to make noise and shout slogans. They began shouting Burzynski's name. The protestors, numbering about 50, eventually formed in the shape of a horseshoe around Burzynski and the students. Burzynski recognized Mleczko as one of the protestors in the room. Burzynski told Mleczko that he and the demonstrators had reached a new low point. Mleczko did not respond.[8] Burzynski and the students walked through the crowd and left the room as other protestors continued to come in.

Once outside the room they encountered an employee of the Communications department who said that she would take them to a part of the building where they could remain until the demonstrator left. After remaining there a period of time Burzynski and the students left the building. She obviously was unable to complete the interviews of these students or of the other students scheduled for that afternoon. Thereafter Burzynski reported this incident to her superiors.[9]

Meanwhile, after about 5 minutes, the protestors left the room and the building and the rally ended. While the demonstration was still in progress staff members from the Frieze building called the University of Michigan Department of Public Safety and reported that the demonstrators were present and were loud, disruptive and interfering with classes but were not being physical and were not damaging property. However, by the time the safety officers arrived at the scene the demonstrators had left the building. Staff reported that the demonstrators had disrupted the interviews.[10]

C. Mleczko's Termination

On November 24, Respondent sent Mleczko a letter that read:

> On Friday, November 13, 1998, a Detroit News editor was interviewing University of Michigan students on the U of M campus in Ann Arbor, Michigan for possible summer internships. It has been reported to me that you, along

[7] These facts are based on Mleczko's credible and uncontested testimony. However, I specifically do not credit Mleczko's testimony that he was unaware that Respondent was conducting interviews in the library. His own testimony shows that when he arrived on campus he was advised that Respondent was interviewing there. He also learned that the interviews were being held at the Frieze building. Indeed, the protestors shouted Burzynski's name as they entered the room. Having entered that building and remained outside the office for 15 to 20 minutes I conclude Mlezcko, like the rest of the group, must have known that the interviews were being conducted in the library.

[8] Mleczko admitted that Burzynski spoke to him as she was leaving the room but the noise level was so high that he could not hear her.

[9] These facts are based on the testimony of Burzynski. Except as specifically indicated I conclude that she is a credible witness. There is an internal consistency to her version of the events. I was also impressed with her demeanor. However, I do not credit her testimony that Mleczko was shouting at her as she was leaving the room. This statement was not included in her pretrial affidavit and Mleczko's overall demeanor convinces me that it is unlikely that he would have done so.

[10] These facts are based on the report of the incident made by a safety officer. To the extent set forth above, I conclude that the report is reliable. I base this conclusion on the fact that the report is corroborated in certain respects by other credible testimony and I find it likely based on those facts that some report to safety officers would have been made under these circumstances. The General Counsel and the Union complain that I improperly accepted the report into evidence. The core of their objection is the contention that the report was not properly authenticated. I adhere to my ruling. I conclude that the document is what it appears to be. It appears on University of Michigan Department of Public Safety letterhead, bearing the seal of the University of Michigan. As indicated, other evidence supports the credibility of the document as a report of the incident. Significantly, the document came from the General Counsel's investigative file, yet he made no argument that the document was not what it appeared to be. Under these circumstances I conclude that the report was adequately authenticated. The Union and the General Counsel also object to the multi-layered hearsay nature of the report. I am aware of that, and I have relied only on those portions of the report that I deem reliable, as set forth above.

> with approximately 50 of the union picketers[11] supporters, gathered in a hallway outside of the interview room and, using bullhorns, disrupted the interview process. Some of the picketers/supporters entered the interview room and shouted in the faces of the interviewer and students. The interviewer and students were forced to leave the room. This conduct violates the terms of a NLRB Settlement Stipulation which provides in part that the Metropolitan Council of Newspaper Unions, their officers, agents and representatives would not restrain, (sic) threaten or coerce employees of The Detroit News because they choose to exercise their rights guaranteed under Section 7 of the National Labor Relations Act.
>
> By this letter. I am giving you the opportunity to meet with me to discuss your alleged involvement in this incident before taking any disciplinary action.

The letter then provided Mleczko with a telephone number to call if he was interested in arranging a meeting. The letter also indicated that if Respondent did not hear from Mleczko by December 13, it would assume that he was not interested in meeting.

The Union responded by letter dated December 3. On behalf of Mleczko,[12] the Union declined the invitation to meet with Respondent. It asserted that Mleczko would not receive fair, nondiscriminatory treatment. The letter also denied any violation of the settlement stipulation.

On December 4, Respondent sent a letter to Mleczko notifying him that he was discharged because of his conduct on November 13.[13] The letter essentially restated the contents of the November 24 letter.

III. ANALYSIS

A. The 102.118 Issue

At the hearing the General Counsel took the position that Mleczko was a participant, but not a leader or organizer of the rally. Respondent suggested that Mleczko and the Union played a greater role in organizing the rally than Mleczko admitted. It attempted to show that Graduates Assistants Union and the council of unions involved in the labor dispute with it are both represented by the same law firm. Moreover, the evidence showed that the Graduates Assistants Union had been actively involved in supporting the unions in their dispute with Respondent. Respondent further established that leaders from other unions involved in the labor dispute with Respondent were present and participated in the rally, including Michael Zielinski, an organizer for the Teamsters Union. Zielinski had played an active role in sponsoring rallies promoting the cause of the unions involved in the labor dispute. Mleczko denied that he had spoken with Zielinski concerning what role Zielinski had in organizing the rally. Also present at the rally was Frances DeChane, who was a discharged striking employee and part of the "Workers Justice Committee" that was involved in strike related activities.

On request of Respondent, and after Mleczko had testified on direct examination, I required the General Counsel to provide Respondent with those portions of the affidavits of Zielinski and DeChane that pertained to the November 13 incident. I based this ruling on the fact that Respondent had made a sufficient initial showing that these individuals may have been working in concert with Mleczko concerning the role played in organizing and leading the rally on November 13.

I adhere to that ruling. I am, of course, aware of the fact that Section 102.118 of the Board's Rules and Regulations provides that a witness statement "of such witness" should be provided. However, I am also aware of my obligation to assure that in unique situations the rules are not applied in a manner that serves to prejudice any of the parties. Here, I concluded that Respondent had made a sufficient preliminary showing that the affiants and Mleczko had acted in concert to play a leadership role in sponsoring the demonstration. Had Respondent succeeded in establishing that fact, then conceivably the affidavits could have been admissible against Mleczko under various theories. Had I not required the production of the affidavits Respondent would not have known their content and whether, for example, they contained statements that the affiants, and Mleczko, acted in concert to prepare the rally and disrupt Respondent's business. This would have prejudiced Respondent in its effort to make its case. That I ultimately concluded that Respondent failed in its effort to establish that Mleczko and others working in concert with him played a leading role in the rally does not compel a different result. Respondent was entitled to evidence that pertained to that subject.

Next, the General Counsel and the Union complain that I admitted the affidavits into evidence. Respondent offered the affidavits and I admitted the affidavits solely for credibility purposes. I adhere to that ruling also. I have used those affidavits to assist in my credibility resolution that Mleczko in fact did not play any role in organizing the demonstration.

B. Mleczko's Termination

The parties disagree as to the proper legal standard to be applied in this case. Respondent argues that the proper legal standard is set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st. Cir. 1981), cert. denied 455 U.S. 989 (1982). The General Counsel and the Union argue that *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964), and *Rubin Bros.*, 99 NLRB 619 (1952), enfd. denied 203 F.2d 486 (5th Cir. 1953), supply the appropriate legal standard. The resolution of this issue turns on the factual setting of this case. I initially conclude that Mleczko's general participation in the rally on November 13 was conduct protected by the Act. It arose as part of the continuing labor dispute between Respondent and the Union. It was designed to gain support for the Union in that dispute. Mleczko was both an employee of Respondent and union president. The protected nature of his presence on campus was

[11] There is no evidence that any picketing occurred during this incident.

[12] Respondent initially thought that another employee had been involved in the incident and sent a letter to him also. It turned out that the other employee had been misidentified and the matter was then dropped. The Union's letter also dealt with that situation.

[13] Because Mleczko was on leave of absence from Respondent at the time, the letter indicated that Mleczko would be fired if he sought to return from his leave.

heightened by the fact that Respondent had chosen to engage in business there. Finally, Mlezcko was terminated as a result of conduct he engaged in during this protected activity. Under these circumstances, I agree with the General Counsel and the Union that the appropriate standard is set forth in *Burnup & Sims* and *Rubin Bros. Siemons Energy & Automation, Inc.*, 328 NLRB No. 164 (1999).

I reject Respondent's assertion that *Burnup & Sims* and *Rubin Bros.* applies only to striker misconduct connected with picket line activity. *Burnup & Sims* itself was not such a striker misconduct case. The Board has stated that:

> [t]he correct standard to apply for determining whether an employer has violated the Act by discharging an employee for alleged misconduct arising out of protected activity is set forth by the Supreme Court in *NLRB v. Burnup & Sims*, 397 U.S. 21 (1964).

E.W. Grobbel Sons, 322 NLRB 304 (1996), revd. on other grounds 149 F.3d 1183, 1183 (6th Cir. 1998). See also *Ideal Dyeing & Finishing*, 300 NLRB 303 (1990).

Next, the General Counsel argues that *Clear Pine Mouldings*, 268 NLRB 1044 (1984), enfd. 765 F.2d 148 (9th Cir. 1985), cert. denied 474 U.S. 1105 (1986), applies in this case. In that regard the General Counsel argues that the test to be used in assessing whether Mleczko's conduct at the Freize building lost the protection of the Act is whether the conduct tends to intimidate or coerce employees in the exercise of their Section 7 rights. The argument continues: "Misconduct for these purposes is *not* defined as activity that interferes with Respondent's ability to conduct business as usual." In *Clear Pine* the Board enunciated the standard to be applied in determining whether picketline misconduct loses the protection of the Act. The Board there found it necessary to consider not only the right of employees to engage in a strike but also the right of employees to refrain from such conduct. These competing rights come sharply in focus in cases where strikers engage in conduct designed to dissuade nonstrikers from crossing a picketline. Thus the Board held that striker conduct becomes unprotected when it tends to coerce or intimidate employees in the exercise of rights protected under the Act. The Board in *Clear Pine* did not intend that the only time that Section 7 activity loses its protection was if it interfered with the rights of other employees. Such a holding, for example, would preclude the discharge of an employee for revealing confidential employer trade secrets during the course of a speech urging employees to join a strike. Moreover, no competing employee rights are involved in a case such as this; no employees were attempting to assert their right to refrain from engaging in Section 7 activity. I thus conclude that *Clear Pine* does not apply in this case in assessing whether Mleczko's conduct lost the protection of the Act. Rather, the test remains that the burden is on the General Counsel to show that either that the misconduct did not occur or that it was not sufficiently serious to warrant discharge. *Coronet Casuals, Inc.*, 207 NLRB 304, 305 (1973).

Applying this legal framework, I first turn to examine whether the conduct for which Mleczko was fired was protected under the Act. If such conduct was protected, no further analysis is required since a violation would be established. As indicated, Respondent fired Mleczko for being part of a group that disrupted the interviewing process by use of loudspeakers, entered the interview room and continued shouting in that room. I conclude that such conduct is not protected under the Act. In reaching this conclusion I recognize that employees have the right under the Act to engage in activities designed to enhance support for their labor dispute with Respondent. However, Respondent also may continue operations during the labor dispute. The ability to hire employees, even summer interns, during the course of a strike is an essential component of the right to continue operations. Although the exercise of Section 7 activities may diminish Respondent's success in continuing operations, there is no Section 7 right to directly interfere with the operation of Respondent in the manner that occurred in this case. I note that the group's activity was not engaged in on a picketline or outside a location where Respondent was doing business. Rather, it took place inside the building, and then inside the very room where Respondent was conducting its business. The group activity was disruptive well beyond what normally might be tolerated in that building and in the room.[14] As noted, the demonstrators loudly shouted slogans and even used a loudspeaker. These activities were designed to directly disrupt the interview process. The combination of the location of the demonstrators, the unusually disruptive nature of the demonstration, and the prolonged duration of the protest in the Frieze building served to cross the line into unprotected conduct.

In arguing that the group's activity was protected the General Counsel cites *National Steel & Shipbuilding Co.*, 324 NLRB 499, 500 (1997), enfd. 156 F.3d 1268 (D.C. Cir. 1998), and similar cases. The General Counsel argues that those cases stand for the proposition that loud, boisterous, disruptive conduct engaged in as part of concerted activity remains protected under the Act. However, those cases are clearly distinguishable. They all involve conduct that occurred outside a place of business on a picketline. The location of that activity serves to differentiate it from the activity in this case.

The General Counsel next argues that Respondent was

> partially responsible for the outspoken response to its hiring efforts. It chose to conduct interviews not at its own well-fortified Detroit premises, but rather at a public university peopled with enthusiastic youngsters who had ready access to campus facilities and who were accustomed to exercising their First Amendment rights in the free and colorful manner typical of college students.

To the extent that this argument has any merit the same may be said for Mleczko's decision to participate in the protest on campus. In any event, this does not serve to excuse Mleczko's conduct as an employee of Respondent.

The General Counsel next argues that Burzynski made the decision to abandon the interviews without explanation as to

[14] In reaching this conclusion I find it unnecessary to conclude that the demonstrators were trespassing. I likewise find it unnecessary to consider the General Counsel's argument that the protestors were not trespassing.

why she did not continue them elsewhere on campus. The argument continues Burzynski's reaction should not be used to determine whether the activity lost its protection. I agree. However, I do not base my conclusions on the subjective reactions of Burzynski. Rather, my conclusion that the activity became unprotected is based on the objective facts of the activity itself.

The General Counsel argues that Mleczko cannot be held accountable for the activity of others in the group and that the Board does not permit "guilt by association." The General Counsel cites cases such as *MP Industries*, 227 NLRB 1709, 1710 (1977). This argument misses the point. I do not conclude that Mleczko is accountable for the misconduct of others in the group. Instead, I conclude that the group activity itself became unprotected and Mleczko was an active participant in that group activity. In this regard, I reject the General Counsel's argument that Mleczko was a mere bystander or passing observer of the group activity. As more fully described above, Mleczko was a full participant in the group activity. He was with the group almost from the start to the end of the protest activity. He served a representative of the group when they entered the Michigan Daily Building. He addressed the group outside that building, using the loudspeaker. He distributed literature inside the Frieze Building and entered the room with the other demonstrators. Mleczko was not a passive observer. The fact that Mleczko did not organize the protest, or did not use the loudspeaker in the halls of the Frieze building, or did not personally open the door to the interviewing room does not serve to diminish the fact that the group activity itself had become unprotected. It is on this basis that the cases cited by the General Counsel are inapposite. More on point is *North Cambria Fuel Co.*, 247 NLRB 1408 (1980), enfd. 645 F.2d 177 (3rd Cir. 1981). There the Board relied on the facts that the discharged strikers "were identified as among a group of 15 or so strikers who returned to [the] premises, where some of the group threw a barrage of rocks at a truck and broke its windshield." Id. at 1409.

Next, the General Counsel argues that disruption of business on November 13, was isolated and fleeting. I disagree. The activity in the hall outside the interview room continued for at least 15 to 20 minutes and the activity in the interview room lasted for an additional 5 minutes. Thus, the disruptive activity continued for a prolonged period of time. This fact serves to distinguish cases cited to me by the General Counsel such as *Ornamental Iron Works Co.*, 295 NLRB 473, 479 (1989), enfd. 935 F.2d 270 (6th Cir. 1991).

I next turn to whether Respondent had a good-faith belief that Mlezko engaged in the misconduct. My findings set forth above compel the conclusion that it did. The General Counsel argues that Respondent lacked a good-faith belief that Mleczko engaged in misconduct because Respondent contended that Mleczko's conduct violated the Sixth Circuit's orders. Indeed, Respondent mentioned that as a reason for Mleczko's discharge in his termination letter and reiterated that position during the trial in this case. Respondent took the position that Mleczko had an obligation under those orders to affirmatively advise the demonstrators not to disrupt Respondent's business. Thus, the General Counsel argues that Respondent thereby held Mleczko to higher standard by virtue of his status as local president. However, I do not rely on Respondent's argument in upholding the Mleczko's discharge. Rather, I have concluded that his conduct became unprotected under the Act independent of the court orders. It follows that the General Counsel's argument based this theory likewise fails.

The burden now shifts to the General Counsel to show that Mleczko did not engage in the misconduct or that the conduct was not sufficiently serious to justify discharge. My findings set forth above show that the General Counsel has failed to do so.[15]

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has not committed the unfair labor practices alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. December 30, 1999

[15] The Union argues that I should apply *NLRB v. Thayer Co.*, 312 F.2d 748, 755 (1st Cir. 1954). However, I conclude that the connection of Mleczko's misconduct with Respondent's prior unfair labor practices is too attenuated to justify the application of the *Thayer* doctrine.

[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.